
U. S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
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Government 8-454-0514

CASE NO. 84-ERA-15

In the Matter of

STEVEN LOCKERT,
Complainant

v.

PULLMAN POWER PRODUCTS CORPORATION
Respondent

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Washington, D.C. 20036
For the Complainant

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For the Respondent

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Before: HENRY B. LASKY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Complainant, Steven Lockert, commenced this proceeding under the Energy Reorganization Act of 1974, as amended (42. U.S.C. § 5851), hereinafter called the Act. He initially filed a complaint, dated January 9, 1984 with the Secretary of Labor on January 20, 1984.

On February 22, 1984, the Department of Labor, Employment Standards Administration, Wage & Hour Division notified the Respondent, Pullman Power Products Corporation, that their investigation revealed that the Act was violated when Complainant was terminated from his employment with Respondent on December 15, 1983 and indicated that Complainant is entitled to reinstatement to his former position together with back wages for the period that Complainant was not employed together with attorney's fees.[1]

Respondent received the aforesaid notification on February 25, 1984 and appealed the decision on February 29, 1984. The case was transferred by the Office of Administrative Law Judges from Washington D.C. to San Francisco, California on March 5, 1984 and a hearing was scheduled pursuant to notice issued May 11, 1984. Counsel for claimant filed an appearance on June 8, 1984. The hearing was held on July 11th and 12th, 1984 in San Luis Obispo, California.

The matter was submitted subject to an order allowing the parties to file proposed findings of fact and conclusions of law and briefs by September 7, 1984 and the waiver by the parties of all time requirments for the issuance of a recommended decision and order until October 7, 1984.

FACTUAL BACKGROUND

Steven Lockert was a Quality Control Inspector for Pullman Power Products at the Diablo Canyon Nuclear Power Plant, Avila Beach, California from July 25, 1983 to December 15, 1983. His duties consisted of performing inspection of welding work performed by craft workers, verifying hardware procedures and work pursuant

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to appropriate required codes and standards.

Respondent had approximately 2,000 employees at the job site of which 250 were involved in quality control and assurance work. Approximately 120-125 of the employees, at the relevant times, were quality control inspectors. The essential function of quality control personnel is to perform visual examination of work to assure correct installation. Personnel assigned to quality assurance matters review the necessary paper work both before and after the craft work. Complainant was one of the quality control welding inspectors at the time of his discharge.

As part of his duties, Complainant was required to record and report work which constitutes non-conformance in what is known as Discrepancy Reports (DR). He also prepared Deficient Condition Notices (DCN) identifying possible deficient conditions and recommended Steps To Prevent Recurrence (STPR) of deficient conditions.

Complainant was an employee paid to inspect welding craft work and to prepare documents such as DR, DCN, STPR as part of an overall program of assuring quality control of the work at the job site.

Complainant's immediate supervisor was Jim Cunningham. Cunningham was responsible to Russ Nolle, who in turn was responsible to Frank Lyautey. Harold Karner was the manager of all the aforsaid as he was field quality assurance and quality control manager.

Complainant asserts and testified that he reported to his supervisors a series of discrepancies in the course of his inspection duties which resulted in adverse reactions of his supervisors and argues that such was the motivation for his termination.

The series of discrepancies referred to by Complainant occurred between September 1, 1983 and December 14, 1983 and included such matters as alleged failure of welders to use and check the appropriate gas flow rates, failure of welding equipment to meet specifications, improper welding procedures, improper modification of "fill-it" welds, use of defective bolts, inability to gain access to check full penetration welds, electode storage allegedly in violation of code, improper rupture restraints, and

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alleged failure to provide appropriate quality control coverage of welders certification testing.

The aforesaid discrepancies were not frivolous but were of a substantial and serious nature and acknowledged as such by the employer at the hearing.

Of significance is the fact that in the expression of concern by Complainant, as reported to supervisory personnel, the Complainant was doing that which he was employed to do as a Quality Control Inspector. In essence, he was performing the job for which he was employed to accomplish. In addition, the Complainant, in the course of his employment from July 1983 to December 1983 did not report an unusual number of discrepancies or deficiencies for the period of time involved as compared to other quality control inspectors. The nature of the reports were not unique. It was repeatedly emphasized at the hearing that the Complainant was a qualified conscientious employee accomplishing his job in an expected manner and was not engaging in any extraordinary abrasive behavior or otherwise involved in unusual personality conflicts at the job site.

The very nature of the work of a quality control inspector may result in friction and differences of opinion between the craft personnel (welders) and the inspectors who are paid to pass judgment on the quality of work performed. Similarly, the subjective nature of the work of a quality control inspector may result in differences of opinion between an inspector such as Complainant and his supervisory personnel. In this case, although some of the discrepancies and/or deficiencies called to the attention of supervisors by Complainant were disagreed with by such supervisors, they were not unreasonable or frivolous concerns. Complainant acknowleged that in dealing with possible violations of standards, reasonable men may have differences of opinion and such matters are subject to disagreement.

Corrobrative of the fact that Complainant was a conscientious qualified employee performing his duties in the manner expected of him, Complainant was recommended for a merit increase in pay in early December 1983.

On October 17, 1983 the Complainant was observed by Mr. Karner in Karner's office researching some material. Karner asked Russ Nolle to check out where Complainant was supposed to be since

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Karner felt that Lockert's being in his office was unnecessary. Nolle and Karner had been receiving complaints that the craft (welders) were being held up in their work when inspectors were out of their assigned work areas. Apparently the craft workers cannot proceed with their work unless an inspector is present to approve the quality of their work as it progresses.

Nolle verbally warned Complainant at that time that in being in Karner's office, notwithstanding the reason, he was away from his assigned work area and if it happened again he would be terminated from his employment.

On December 14, 1983 at approximately 6:30 a.m., Jim Cunningham, Complainant's lead man, told Complainant he was assigned to "area ten" to work. Complainant requested and was given permission to complete the appropriate paper work for two STPR's and to go to containment two for such purposes. Cunningham testified that he gave such permission as he estimated that it would take about a half an hour for Complainant to complete such paper work and that Complainant would be able to get to area ten by 7:15 to 7:30 a.m. Apparently Mr. Lockert completed the two STPR's and decided to accomplish some other administrative paper work and duties and did not reappear at the quality control office until approximately 9:20 a.m. Jeff Charbaneau, a supervisor, reprimanded him for not being in his assigned work area ten and that his absence held up production. Complainant apologized for the situation and left to cover area ten as assigned. Charbaneau did not take any disciplinary action as he was not Complainant's regular supervisor and Russ Nolle, who was, was not at work on December 14, 1983.

The evidence established that the fabrication shop in area ten needed a quality control inspector and Pat Watson arranged with Cunningham to have Lockert cover the situation on December 14, 1983. Area ten kept calling Pat Watson almost every half hour thereafter that Lockert had not arrived and they needed someone right away. Lockert's absence from area ten delayed the work on a a rupture restraint project and no other qualified man was apparently available.

At approximately 7:00 a.m., after the first inquiry by area ten personnel as to the whereabouts of Lockert, Pat Watson contacted Joe Watson. Joe Watson contacted Cunningham who told him that Lockert had some paper work to complete in containment two and

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would then head on down to the area ten fabrication shop. At approximately 7:40 a.m. Pat Watson again called Joe Watson inquiring as to the location of Lockert and again at 8:10 a.m. a similar phone call was made. Joe Watson contacted Cunningham who replied that he was unable to locate Mr. Lockert.

Jim Cunningham testified that if had known that Complainant was going to accomplish tasks other than the completion of the two STPRs, he would have told Complainant to do it at another time or he would have gotten another man to cover area ten on the morning of December 14, 1983. He further testified that after 8:00 a.m., he want looking for Complainant because of the urgency expressed by area ten personnel but was unable to find him. He later stated that he had seen Complainant between 7:30 and 7:45 a.m. but wasn't looking for him at the time, which is curious since he knew it was beyond the time that he orginally expected Lockert to be at area ten. There is serious question as to how diligent Mr. Cunningham's efforts were in attempting to locate Complainant during his absence from the assigned work area ten. Cunningham's failure to leave a message for Complainant, search for him or make inquiry of others in containment two renders his testimony in this regard suspect.

Complainant's supervisor, Russ Nolle, was not present during the events of December 14, 1983 but when he was informed on December 15, 1983, he got particularly upset and he decided to terminate Mr. Lockert from his employment and reported the matter to Harold Karner. Mr. Nolle apparently was upset that one of his men had held up production by not being at his assigned work area and particularly because Complainant was warned once before in mid-October about the same behavior and had been told at that time that if it happened again he would be terminated from his employment.

The rules in existence at the job site provide that an employee who leaves assigned work areas without authorization is subject to termination and is not eligible for re-hiring. Although there was no evidence of any other employee being terminated for such reason there similarly was no evidence of any other employee committing such a violation of an equivalent duration.

When Mr. Karner was told by Mr. Nolle of the events of December 14, 1983 and the recommendation to fire Complainant, Karner told Nolle to document the events and he would ultimately make the decision. Such was done and Mr. Karner, as quality

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control manager, made the decision to terminate Complainant. The sole basis of the termination, according to both Mr. Nolle and Mr. Karner was Complainant's absence from his assigned work area on December 14, 1983.

A termination notice was prepared with a brief description of the events and specifying that the reason for termination was failure to appear at assigned work area for approximately 3 hours on December 14, 1983. At the trial, there was some confusion with reference to the termination notice because of the location of certain signatures on the document and the use of the pronoun "I". Without explanation it is difficult to determine to whom the "I" is referring. Testimony established that page one of the brief facts on the notice of termination were written by Joe Watson who signed the document on page two and not Russ Nolle who signed on page one as supervisor because Mr. Nolle was not present at work on December 14, 1983. Page two of the termination notice was written by Jeff Charboneau.

Complainant never reported the discrepancies and deficiencies previously referred to above, to any outside source beyond his supervisors while in the employ of Respondent. He never commenced, caused o be commenced or threatened to commence a proceeding as referred to in 42 U.S.C. § 5851(a)(1), testified or was about to testify in any such proceeding or, assisted or participated or was about to assist or participate in such proceeding or any other action as referred to in 42 U.S.C. § 5851(a)(2)(3).

LEGAL ISSUES

1. THE MOTION OF THE RESPONDENT TO DISMISS THE MATTER FOR LACK OF JURISDICTION IS DENIED.

The Secretary of Labor has not lost jurisdiction to hear this proceeding. At the outset of the hearing on July 11, 1984, Respondent moved to dismiss on the grounds that 42 U.S.C. § 5851(b)(2)(A) provides that the Secretary of Labor shall issue an order granting the Complainant's relief or denying the complaint, within 90 days of receipt of the complaint, which in this case was January 20, 1984. Respondent asserts that by not complying with the aforesaid statute by April 20, 1984, the Secretary of Labor has lost jurisdiction. Such argument is without merit.

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The time specifications of the statute are made for the purpose of expediting the proceeding for the benefit of a Complainant who may have been wrongfully terminated from his employment in violation of the statute. These time requirements are not jurisdictional. Violation of the non-discretionary time limits imposed by the statute subject the Secretary of Labor to a mandamus proceeding under Section 1361 of Title 28. (See 42 U.S.C.A. 5851(f)). Such is the only consequence of the failure to comply with the unrealistic time limits set by law and the Secretary of Labor is not divested of jurisdiction to act in the case.

The case herein was processed in an expedited manner and notice of hearing was issued as promptly as possible subject to the administrative resources available, availability of courtroom space, judge, and other factors requiring time for the parties to prepare far the hearing.

I conclude that the Secretary of labor has not lost jurisdiction of the matter and, secondly, Respondent waived any right to complain of any delay in the scheduling of the hearing by his failure to raise such objection prior to the hearing date by an appropriate mandamus proceeding pursuant to 28 U.S.C. § 1361 which is the sole remedy available to him under 42 U.S.C.A. § 5851. The motion by the Respondent to dismiss is therefore denied.

2. CLAIMANT IS NOT ENTITLED TO THE PROTECTION OF 42 U.S.C. § 5851 AS HE DID NOT ENGAGE IN ANY PROTECTED ACTIVITY WITHIN THE COVERAGE OF THE STATUTE.

42 U.S.C. § 5851 provides:

> "(a) no employer, including a commission licensee, an applicant for a commission license, or a contractor or a sub-contractor of a commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee).
> (1) Commenced, cause to be commenced, or is about to commence, or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of

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> 1954, as amended, or a proceeding for the administration, or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
> (2) Testified or is about testify in any such proceeding or;
> (3) Assisted or participated or is about assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this act of the Atomic Energy Act of 1954 as amended."

The essential elements of a discrimination claim under the Energy Reorganization Act must first be determined. As was stated in *DeFord v. Secretary of Labor*, 700 F.2d 281(1983):

> "By its terms, Section 5851(a) prohibits certain employers from discriminating in practically any job related fashion against an employee because the employee participated in NRC investigations or enforcement proceedings. The particular elements of a valid discrimination claim would appear most obviously to include: (1) that the party charged with discrimination is an employer subject to the Act; (2) that the complaining employee was discharged or otherwise discriminated against with respect to his compensation, terms, conditions, or privileges of employment; (3) that the alleged discrimination arose because the employee participated in an NRC proceeding under either the Energy Reorganization Act of 1974 or the Atomic Energy Act of 1954."

A reading of the statute indicates that as to element (3) recited by the court, the alleged discrimination must arise because the employee not only "participated" in the referred to Proceeding but that such "participation" includes "commencing, caused to be commenced, or is about to commence or caused to be commenced" such proceeding; "testified or is about to testify" in such proceeding; or "assisted or participated or is about to assist or participate" in such a proceeding or does anything else in connection with such a proceeding.

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Turning to the facts at hand, there is no evidence of any kind that as to element (3) referred to by the court in *DeFord* or as elaborated in detail in the statute itself, that Complainant did anything during his employment constituting a nexus with such a proceeding referred to in the statute. To the contrary, any reported deficiencies or discrepancies were made by Complainant through appropriate employer channels and in so doing, Complainant was performing the duties for which he was employed.

There is no dispute between the parties that the Respondent is an employer subject to the Act and that Complainant was discharged from his employment. However, there is also no evidentary dispute between the parties that Complainant reported safety discrepancies, deficiencies and concerns to appropriate employer channels during his employment. The employee protections of 42 U.S.C. § 5851 does not apply to such activity. Complainant did nothing sufficient to come within the protected activity of the statute.

> "The purpose of the Act is to prevent employers from discouraging cooperation with NRC investigators, and not merely to prevent employers from inhibiting disclosure of particular facts or types of information. Under this anti-discriminatory provision, as under the NLRA, the need for broad construction of the statutory purpose can be well characterized as .. necessary" to prevent the

> [investigatory agency's] channels of information from being dried up by employer intimidation, *DeFord v. Secretary of Labor*, supra, at 286.

There was no evidence presented at the hearing that Complainant, prior to his discharge, provided any information regarding his safety concerns to any investigative agency or intended to do so but to the contrary, there was evidence, uncontradicted, that the employer personnel who participated in the Complainant's discharge, had no knowledge of any such activity of the Complainant which would fall within the protected activity of the statute under which this proceeding is brought. The lack of knowledge of any protected activity of Claimant by his employers is because there was no such activity.

The Legislative history of the Act clearly establishes that the statute "offers protection to employees who believe that they, have been fired or discriminated against as a result of the fact

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that they have testified, given evidence, or brought suit under the Energy Reorganization Act of 1974 or the Atomic Energy Act." *1978 U.S. Code Cong. and Adm. News*, page 7303. The Complainant is not such an employee.

Counsel for Complainant relies on *Batts v. TVA*, 82 ERA 15 (ALJ Decision 1982), *Atchinson v. Brown and Root*, 82 ERA 9 (ALJ Decision, 1982, *Pensyl v. Catalytic, Inc.*, 83 ERA 2 (Final Order of Secretary of Labor, January 13, 1984), *Richter v. Baldwin Associates*, 84 ERA 9-12 (ALJ Decision, 1984), for the proposition than an employee bringing quality control and safety problems to the attention of his own management as part of his normal duties is protected activity under the Act. I disagree that such an interpretation of the Act is valid for reasons heretofore stated and the reliance on such cases is misplaced.

The recent case of *Mackowiack v. University Nuclear Systems, Inc*. 735 F.2d 1159 (9th Cir. 1984) has resulted in further confusion of the issue of whether the protected activity of the statute covers internal safety and quality control complaints brought to the attention of the employee's own management. In *Mackowiack*, the complainant was fired in January of 1982, after talking with inspectors from the N.R.C. in September of 1981 in connection with their investigation of UNSI's work. The employer was aware of Complainant's involvement in late September or early October 1981 and terminated him in January 1982. The record of the case supported a finding that UNSI's termination of Complainant was motivated in part by his contact with N.R.C. Clearly, *Mackowiack* was engaged in protected activity covered by the statute. Curiously, the court further determined that Complainant's internal safety complaints to the employer triggered the application of the statute based on *PHILLIPS v. Department of Interior*, 500 F.2d 772 (D.C. Cir. 1974).

An examination of *Phillips* reveals that the court was faced with an interpretation of the Mine Health and Safety Act, 30 U.S.C. § 820(b)(1) which has similar "whistle blower" provisions to 42 U.S.C. § 5851(a). In *Phillips*, the court held that a safety complaint to a foreman was "protected activity" because it was an essential preliminary step in constituting notice to the Secretary of Interior or his authorized representatives and the institution of proceedings which were in fact "protected activity" under 30 U.S.C.A. § 820(b)(1). The court's reasoning was because of the existence of the procedure at the particular mine which guaranteed

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that the safety internal complaint of a "whistle blower" will result in a Federal Mine Inspector being called in if the employer neglects or refuses to correct the cause of the complaint. It was because of this particular procedure that an initiating internal safety complaint which would result in a Federal Mine Inspector being called in that the court in *Phillips* held that an internal complaint was protected activity.

Consequently the court in *Mackowiack* drew an erroneous analogy that all internal safety complaints under 42. U.S.C. § 5851(a) are protected activity because of the *Phillips* decision making such a conclusion under 30 U.S.C. § 820(b)(1) on a unique set of facts which were not similar to those in *Mackowiack*.

In the case at bar there is no evidence that a quality control inspector who performs his job in a normal fashion falls within the protected activity of 42 U.S.C. § 5851(a). The authorities holding to the contrary constitute a judicial amendment to a legislative enactment.

3. ASSUMING THAT THE COMPLAINANT'S ACCOMPLISHMENT OF HIS NORMAL EMPLOYMENT DUTIES AS A QUALITY CONTROL INSPECTOR IS PROTECTED ACTIVITY WITHIN 42 U.S.C. § 5851, SUCH ACTIVITY DID NOT CONSTITUTE THE BASIS FOR THE TERMINATION OF HIS EMPLOYMENT.

Even if the assumption is made that Complainant was engaged in protected activity under the Act, then the evidence must be evaluated as a case involving a "dual motive" discharge. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274. 287 (1977). In such cases, the employee first has the burden of showing that his conduct was protected and that the protected conduct was a motivating factor in the employer's decision to terminate him. Thereafter the burden shifts to the employer to show by a perponderance of the evidence that it would have reached the same decision as to the employee's dismissal even in the absence of the protected conduct. *Consolidated Edison Company v. Donovan*, 673 F.2d 61 (1982). In other words, the employee would have not been dismissed "but for" his engaging in protected activity.

The question is not merely whether there exists independent and proper grounds for the termination or whether the employer had

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a legitimate reason for terminating the Complainant, but whether the employer would have terminated him if only the valid ground for discharge had existed.

Applying the evidence to the aforesaid law, it is the opinion of the undersigned that first, Complainant has not met his burden of showing that his conduct was protected under the Act; secondly assuming the normal accomplishment of his duties as testified to as a quality control inspector is protected activity, the employer has shown by a preponderance of evidence that Complainant would have been terminated for being absent from his authorized work place even in the absence of such protected conduct. I cannot conclude from the evidence that the Complainant would not have been dismissed but for his engaging in his required duties as reported. The sole basis for Complainant's termination was Nolle's recommendation to fire Complainant for failure to appear at his assigned work area for approximately three hours on December 14, 1983. Complainant has not presented persuasive evidence that the employer's recited reason for the termination was an excuse in order to fire him for the reasons that he had reported safety discrepancies and deficiencies or that such activities were the moving cause of the termination notwithstanding the reason that Complainant was absent from his assigned work place on December 14, 1983.

The evidence demonstrates that Nolle and Karner fired Complainant for the sole reason given and their credibility in this regard was unimpeached. One might well disagree with their decision as I am sympathetic with Complainant who impressed me as a conscientious qualified worker who was the victim of a combination of circumstances the responsibility for which must be placed at the feet of Jim Cunningham. Mr. Cunningham authorized Complainant to go to containment two on December 14, 1983 prior to his reporting to area ten were he was assigned to work as Cunningham anticipated that Complainant would be able to go to the assigned area ten by 7:15 to 7:30 a.m. Cunningham's testimony was unconvincing as to the efforts he made to earnestly locate Complainant after area ten personnel were frantically calling as to Complainant's whereabouts. I find Cunningham's testimony unbelievable in this regard. Although the penality of termination was unduly harsh in view of the surrounding circumstances and cavalier behavior of Cunningham, it is and was a management perogative and not my function to superimpose my judgement to the contrary in the absence of a violation of the Act. Any remedy of

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the Complainant is outside this forum.

RECOMMENDED ORDER

It is hereby recommended that the complaint of Steven Lockert be dismissed with prejudice.

HENRY B. LASKY
Administrative Law Judge

DATED: 5 OCT 1984
San Francisco, California

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[ENDNOTES]

[1] The file reflects that Complainant was representing himself and did not secure the services of an attorney for the purposes of filing his complaint. Consequently the basis for the award of attorneys' fees is unknown.